



BEFORE THE ARIZONA CORPORATION COMMISSION

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Chairman

WILLIAM A. MUNDELL

Commissioner

MARC SPITZER

Commissioner

MIKE GLEASON

Commissioner

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Commissioner

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Arizona Corporation Commission

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IN THE MATTER OF DISSEMINATION OF
INDIVIDUAL CUSTOMER PROPRIETARY
NETWORK INFORMATION BY
TELECOMMUNICATIONS CARRIERS

DOCKET NO. RT-00000J-02-0066

**RESPONSE OF ARIZONA WIRELESS CARRIERS GROUP
TO STAFF'S LATE FILED EXHIBIT REGARDING CPNI RULES**

The Arizona Wireless Carriers Group¹ ("Wireless Carriers Group") submits this Response to the Late Filed Exhibit (the "Exhibit") distributed by Commission Staff ("Staff") on March 17, 2005. The Exhibit seeks to support Staff's recommendation that the Commission adopt new CPNI regulations by speculating that some customers may not understand the CPNI notices sent by their carriers. These speculations, however, fundamentally misapprehend the burden the Commission must meet in order to promulgate rules that restrict commercial speech.

1. The Proposed Rules Unconstitutionally Restrict Commercial Speech.

As the Wireless Carriers Group pointed out previously,² Staff's proposed CPNI rules closely mirror regulations that were found unconstitutional by two federal courts on First

¹ For purposes of this proceeding, the Arizona Wireless Carriers Group consists of Verizon Wireless, Cingular Wireless, Nextel West Corp. d/b/a Nextel Communications, Sprint Spectrum L.P. d/b/a Sprint, Cricket Communications, Inc., ALLTEL Communications, and VoiceStream PCS III Corporation d/b/a/ T-Mobile.

² See Comments of the Arizona Wireless Carriers Group (filed December 22, 2004) and Exceptions of Arizona Wireless Carriers Group to Recommended Order Urging Adoption of CPNI Rules (filed October 8, 2004).

Amendment grounds. See *U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999); *Verizon Northwest, Inc. v. Showalter*, 282 F. Supp. 2d 1187 (W.D. Wash. 2003). These courts noted that CPNI restrictions very similar to those Staff is recommending to the Commission constituted unconstitutional abridgements of commercial speech. The courts stressed that the restrictions could therefore survive First Amendment scrutiny only if the government could produce a record demonstrating: (1) that it had a substantial interest in regulating the speech in question, (2) that the regulations directly and materially advanced that interest, and (3) that the speech-restrictions were no more extensive than necessary to serve that interest. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). In both cases, the restrictions failed the First Amendment test because they relied, without adequate justification, on heavily speech-burdening "opt in" requirements for the use of CPNI. Staff's proposed rules would implement exactly this type of "opt in" regime with a one-year delay, and thus suffer from the same constitutional flaw as the rules invalidated in *U.S. West* and *Verizon Northwest*. Nothing in the Exhibit addresses this constitutional flaw in the proposed rules.

2. The Record Reflects That There Is No Substantial Interest in Regulating CPNI

Staff must present a record that gives rise to a "substantial interest" warranting Commission regulation of CPNI use to survive the First Amendment test. *Central Hudson*, 447 U.S. at 564. Staff does not appear to dispute this obligation. Nevertheless, the Exhibit completely fails to offer any record evidence demonstrating that the Commission has a substantial interest in regulating CPNI. The absence of a concrete and serious problem with Arizona carriers' use of CPNI is fatal to the Commission's attempt to promulgate rules that restrict commercial speech.

With regard to the record compiled by the Commission, what is most notable is what the Exhibit does *not* say: It does *not* say that Staff has collected evidence of widespread complaints by Arizona customers regarding carriers' use of their CPNI. It also does not say that the Commission has heard from consumers who are concerned about what carriers might do with CPNI. In light of the fact that the Commission convened a series of fourteen open meetings around the state to gather CPNI comments, this silence speaks volumes. In addition to state-wide public meetings, Staff also collected approximately 730 pages of data responses from carriers addressing questions about CPNI – including one asking them to identify any customer complaints they had received about the use of CPNI. *See* Exhibit Attachment C STF 1.14. The Exhibit does not reference a single consumer complaint regarding CPNI.

The Wireless Carriers Group has examined the transcripts from the public meetings and the data responses and confirmed Staff's own unspoken conclusion: Staff's comprehensive effort to discover a pattern of consumer CPNI complaints conspicuously fails to produce evidence of any consumer dissatisfaction with how carriers currently use (and are restricted from using) CPNI under the federal rules. *See* 47 C.F.R. § 64.2001-2009. Staff has actually created a record that affirmatively demonstrates that they *cannot* pass the First Amendment substantial interest test. The documented absence of consumer complaints shows that there is no concrete and serious problem that the Commission could have a substantial interest in addressing through the proposed speech-restricting rules. In a nutshell, the Commission cannot restrict speech without a "substantial interest," and the record now affirmatively shows that despite significant effort by Staff, the "substantial interest" required to warrant such a serious restriction on commercial speech simply does not exist.

The Exhibit seeks to fill this void in the record in two ways, neither of which is effective. First, Staff reviews the response to the Commission's data request on the use of "opt out" notices to customers. Staff then posits that it is "unreasonable to assume" that the various CPNI notices "would be understood by *all* customers" (*id.* at 2 (emphasis added)). This supposition is not anchored in even a single complaint from a single customer. In fact, it amounts to no more than speculation by Staff that particular notices might not be understood by all customers. As the Tenth Circuit made plain in *U.S. West*, this sort of free-floating speculation is inherently incapable of justifying a speech-restricting regulation. *See U.S. West*, 182 F.3d at 1239 (government could not justify CPNI regulation by "merely speculat[ing]" that it would remedy a substantial number of customers' privacy concerns).

Second, Staff suggests that the carriers, rather than the Commission, bear the burden with respect to the validity of the proposed rules. For example, Staff asserts that carriers have produced "little evidence that their customers fully understand" their "opt out" notices, and that "the record does not support the idea" that customers "always" understand them. Exhibit at 3. Staff has it exactly backwards. The carriers are not the ones attempting to enact a speech-restricting regulation. It is the Commission that is considering doing that, and thus it is the Commission that "bears the responsibility of building a record adequate to clearly articulate and justify the state interest" that it asserts as justification of the proposed speech-restriction. *U.S. West*, 182 F.3d at 1234. As noted above, the record does just the opposite.

3. The Proposed Rules Require Consumers to "Opt-In."

Staff concludes in the Exhibit that customers should always be required to confirm a carrier's use of their CPNI. Exhibit at 3. In other words, "opt-out" consent is never sufficient. Every court that has considered this issue, however, has held that an "opt-in" requirement alone

is too restrictive, and that “opt-out” consent can adequately protect customer privacy. *U.S. West, Inc.*, 182 F.3d at 1238-1240; *Showalter*, 282 F. Supp. 2d at 1195. To resolve this dilemma, Staff adopts an elongated “opt-in” system and renames it “opt-out with verification.” Fairly read, however, this verification requirement imposes an affirmative “opt-in” burden on the customer. Staff’s contention that a delayed opt-in is tantamount to an opt-out is not supported by the law or by a plain reading of the rule. When a customer must affirmatively act to make CPNI available, that is an opt-in system. In this case, the “opt-in” system is far more extensive than necessary to serve the stated interest, and exceedingly restrictive when viewed in light of the absence of evidence supporting a need for the restriction.

The Exhibit’s conclusion that consumers do not “fully understand the opt-out approval method” and therefore cannot give knowing consent is similarly misguided. The FCC studied wireless consumer expectations in 1999, and concluded that wireless carriers should be permitted to use CPNI, without affirmative customer approval, to market equipment and information service to consumers. It is worth noting that the FCC did not conclude that consumers were unqualified or ill-prepared to navigate an “opt-out” system. To the contrary, the FCC found that “[c]ustomers expect to have CPE and information services marketed to them along with their CMRS service by their CMRS provider.” *In re Implementation of Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information*, FCC 99-223, para. 41-42 (rel. August 16, 1999). The Exhibit’s conclusion that consumers cannot be adequately protected by an opt-out approval method is not supported by the facts and is inconsistent with the FCC’s guidance on this issue.

CONCLUSION

In summary, the Exhibit only highlights, and does not cure, the fatal constitutional flaws in the proposed rules. The Commission should reject Staff's attempt to sidestep the constitutional issue by means of speculation and improper burden-shifting, and decline to enact these unconstitutional rules.

DATED this 7th day of April, 2005.

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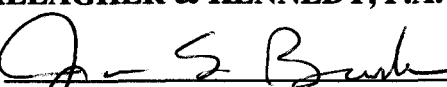
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CERTIFICATE OF SERVICE

I certify that the original and thirteen copies of **RESPONSE OF ARIZONA WIRELESS CARRIERS GROUP TO STAFF'S LATE FILED EXHIBIT REGARDING CPNI RULES** in Docket No. RT-00000J-02-0066 were hand delivered on April 7, 2005, to:

Arizona Corporation Commission
Utilities Division – Docket Control
1200 W. Washington Street
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and a true and correct copy was hand delivered on April 7, 2005, to:

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